

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

STEPHANIE JENSEN,

Defendant.

No. C 06-00556-2 CRB

**ORDER RE SENTENCING
GUIDELINES**

On December 5, 2007, a jury convicted the defendant Stephanie Jensen on one count of conspiracy and one count of falsifying company books and records. The evidence at trial proved that as the director of Brocade Communications' Human Resources Department, Jensen willfully and knowingly falsified the company's corporate records over a three-year period to conceal the actual date when stock options were granted by the company's CEO, Gregory Reyes. Now before the Court is the task of sentencing.

As a threshold matter, the Court must determine whether Jensen's sentence may include a term of imprisonment. The Securities Exchange Act's penalty provision, 15 U.S.C. § 78ff, precludes imprisonment "for the violation of any rule or regulation if [the defendant] proves that he had no knowledge of such rule or regulation." The Court concludes that Jensen's sentence may include a term of imprisonment because she has not carried her burden of establishing that she had no knowledge of the SEC rule prohibiting the

1 falsification of books and records, 17 C.F.R. § 240.13b2-1.

2 Because the “No Knowledge Clause” does not preclude imprisonment in this case, the
3 Court must accurately calculate the appropriate sentence under the Sentencing Guidelines.
4 Although the United States Sentencing Guidelines are advisory after United States v. Booker,
5 543 U.S. 220 (2005), this Court is still obligated to properly calculate the applicable
6 guideline range. See United States v. Mohamed, 459 F.3d 979, 985 (9th Cir. 2006).
7 Pursuant to the analysis set forth below, the Court calculates Jensen’s recommended sentence
8 as 6-12 months imprisonment, based on a base offense level of 6, a two-level abuse of trust
9 enhancement, and a two-level enhancement for obstruction of justice.

10 APPLICATION OF NO KNOWLEDGE CLAUSE

11 Section 78ff(a) provides that “no person shall be subject to imprisonment . . . for the
12 violation of any rule or regulation if he proves that he had no knowledge of such rule or
13 regulation.” Concerned that “a great mass of rules and regulations would be issued by” the
14 SEC in the wake of the Securities Act and Securities Exchange Act, Congress enacted the No
15 Knowledge Clause, thereby “rendering ludicrous a strict adherence to the fiction of presumed
16 knowledge of the law.” United States v. Guterma, 189 F. Supp. 265, 275 (S.D.N.Y. 1960).

17 The No Knowledge Clause is “an affirmative defense to a sentence of imprisonment.”
18 United States v. O’Hagan, 521 U.S. 642, 677 n.23 (1997). As such, the defendant bears the
19 burden of proving no knowledge by a preponderance of the evidence. See United States v.
20 Kneuppel, 293 F. Supp. 2d 199, 204 (E.D.N.Y. 2003). To be more specific, Jensen bears the
21 burden of proving that she “did not know there was any applicable [SEC] rule” prohibiting
22 the falsification of books and records. United States v. Dixon, 536 F.2d 1388, 1398 n.10 (2d
23 Cir. 1976); see also Kneuppel, 293 F. Supp. 2d at 204 (“Defendants also agree that lack of
24 knowledge of the specific rule violated is immaterial and that they must show lack of
25 knowledge of the substance of the rule . . .”). It is not a defense for Jensen to argue that she
26 did not know, for example, “the precise number or common name of the rule, the book and
27 page where it was to be found, or the date upon which it was promulgated.” United States v.
28 Lilley, 291 F. Supp. 989, 993 (S.D. Tex. 1968).

1 As a threshold matter, the government argues that the clause is inapposite because
2 Jensen was convicted of a rule and a statute. The government is correct that the No
3 Knowledge Clause does not protect a defendant convicted of violating a securities statute.
4 See United States v. Sloan, 399 F. Supp. 982, 984 (S.D.N.Y. 1975) (“Congress did intend to
5 maintain the usual presumption of knowledge with respect to the standards prescribed in the
6 securities acts themselves. The ‘no knowledge’ proviso is explicitly limited to lack of
7 knowledge of a ‘rule or regulation’.”). Thus, Jensen may not rely on the clause if the jury
8 convicted her of violating the Books & Records statute, 15 U.S.C. § 78m.

9 However, the Court cannot determine whether the jury convicted Jensen of violation a
10 statute because she was indicted for falsifying books and records in violation of § 78m and
11 17 C.F.R. § 240.13b2-1. The verdict form asked the jury to decide whether Jensen falsified
12 books, records, and accounts in violation of 15 U.S.C. §§ 78m, 78ff, and 17 C.F.R. §
13 240.13b2-1. See Docket No. 732. It would be Apprendi error for the Court to decide that the
14 jury convicted Jensen under § 78m rather than under (or in addition to) the attending
15 regulation.

16 In Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), the Supreme Court held that
17 “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime
18 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a
19 reasonable doubt.” The question that Apprendi forces the Court to answer is whether “the
20 required finding expose[s] the defendant to a greater punishment than that authorized by the
21 jury’s guilty verdict?” Id. at 494.

22 Finding that the jury convicted Jensen of § 78m would expose her to greater
23 punishment than permitted under § 78ff’s No Knowledge Clause. That is to say, if the jury
24 concluded that Jensen violated 17 C.F.R. § 240.13b2-1 – but not § 78m – then the maximum
25 statutory term of imprisonment is zero. By finding that the jury entered a guilty verdict
26 pursuant to § 78m, the Court would expose her to a prison term of up to 20 years, which is –
27 ipso facto – greater than that authorized by statute. Just as a court cannot use a general
28 verdict form in a drug case and make a finding – after a guilty verdict is returned – regarding

1 drug type and quantity, it is not permissible to use a general verdict form in this case and then
2 subsequently make assumptions about what the jury found.¹

3 There would be no Appendi error if the Court could be sure that the jury convicted
4 Jensen under § 78m. But such a certain finding is not possible under the circumstances
5 because § 78m and § 240.13b2-1 are not coextensive. The SEC’s regulation is more broad
6 because it prohibits both direct and indirect falsifications and contains no mens rea
7 requirement. See 17 C.F.R. § 240.13b2-1 (“No person shall directly or indirectly, falsify or
8 cause to be falsified, any book, record or account subject to Section 13(b)(2)(A) of the
9 Securities Exchange Act.”). The Jury Instructions expressly permitted the jury to convict
10 Jensen if they concluded that she indirectly falsified documents. See Jury Instructions at 16
11 (stating that the jury must find “Ms. Jensen, directly or indirectly, falsified or caused to be
12 falsified any such book, record or account of Brocade”).

13 The government argues that a defendant can be convicted of indirectly falsifying
14 books under § 78m as well, pursuant to aiding and abetting liability. See 18 U.S.C. § 2. But
15 that argument hinges on the assumption that aiding and abetting liability contemplates all
16 conduct criminalized by § 240.13b2-1, which it does not. Aiding and abetting liability
17 requires proof of some affirmative act of assistance in the commission of the crime. See
18 Altamirano v. Gonzales, 427 F.3d 586, 594 (9th Cir. 2005). Contrarily, acts of omission
19 might be sufficient to trigger liability under Rule 13b2-1. See SEC v. Softpoint, Inc., 958 F.
20 Supp. 846, 866 (S.D.N.Y. 1997) (concluding that corporate president violated Rule 13b2-1
21 by failing to excise fictitious entries and payments from accounts receivable ledger).

22 Nor is it any answer to argue that Jensen was convicted of another statute: the federal
23 conspiracy statute, 18 U.S.C. § 371. Where the defendant is convicted of a misdemeanor –

24
25 ¹ In United States v. Tarallo, 380 F.3d 1174 (9th Cir. 2004), the Ninth Circuit rejected the
26 defendant’s argument that § 78ff is facially unconstitutional because it violates Appendi’s rule
27 that any fact other than a prior conviction which increases the penalty for a defendant’s crime
28 beyond the statutory maximum must be submitted to the finder of fact and proved beyond a
reasonable doubt. The Court held that § 78ff(a) is constitutional because it merely provides for
an affirmative defense that can mitigate a sentence, and does not authorize an enhancement
in sentence. Id. at 1192. Of course, Jensen forwards a different and more powerful challenge. She
argues not that the Court cannot make a finding as to knowledge, but rather that the Court cannot
make a finding as to what the jury concluded.

1 that is, an offense punishable by one year of imprisonment or less, see 18 U.S.C. § 1 – then
2 “the punishment for such conspiracy shall not exceed the maximum punishment provided for
3 such misdemeanor.” 18 U.S.C. § 371. If Jensen could not be imprisoned because she did not
4 know that her conduct violated a SEC rule or regulation, she could not be imprisoned
5 pursuant to the conspiracy statute either.

6 Accordingly, the question becomes whether Jensen has satisfied her burden of proving
7 by a preponderance that she was unaware of a SEC rule or regulation prohibiting the
8 falsification of books and records. In the Court’s opinion, she has not. Jensen argues that:
9 (1) her background and experience are in areas that have nothing to do with SEC rules and
10 regulations; (2) her job responsibilities had nothing to do with SEC rules or regulations; (3)
11 Jensen had nothing to do with the SEC reporting process; (4) none of the individuals who
12 worked with Jensen drew any connection between their work on options grants and SEC
13 regulations; and (5) none of the more than 50 deponents in the SEC action recall discussing
14 anything connected to any SEC rule with Jensen.

15 There is no smoking gun conclusively demonstrating that Jensen was aware that
16 falsification of books was outlawed by SEC regulation. However, the circumstantial
17 evidence that Jensen offers up is insufficient to carry her burden in light of the evidence
18 established at trial. As explained in the Order Denying Motion for Acquittal (Docket No.
19 824), there is substantial evidence that Jensen knew her conduct was wrongful, including the
20 fact that Jensen attempted to minimize the obviousness of backdated options, concealed the
21 way options were actually dated, and directed employees not to communicate about options
22 over the phone or email. To be sure, Jensen can only be imprisoned if she knew her conduct
23 was unlawful and knew that it was prohibited by SEC rule or regulation. But in light of the
24 evidence demonstrating that Jensen knew her conduct affected Brocade finances, the Court is
25 assured that Jensen also knew she was violating SEC rule or regulation.

26 For example, Jensen received emails establishing that options had an effect on
27 Brocade financials and audits. On January 28, 2002, Jensen received an email from Brocade
28 comptroller Bob Bossi, asking for the stock grant list to support an upcoming quarter-end

1 audit from Arthur Anderson. See 90:21-91:20. Similarly, Jensen received an email
2 confirming that the stock options grant lists and compensation committee meetings would be
3 used in Brocade's year-end audit. See RT 367:12-24. The only reasonable conclusion to
4 draw is that Jensen knew that stock options, and how they were priced, affected the audited
5 results of the company.

6 Moreover, there was evidence at trial that after Jensen shepherded options through the
7 pricing process, the forms were then given to the finance department so that finance could
8 ensure that the grants were accurate. See RT 530:4-14, 532:2-8. It can be reasonably
9 assumed that as director of human resources, Jensen understood the chain for processing
10 option grants and that stock options went from human resources directly to finance. A
11 reasonably intelligent corporate official would understand that if the options forms went
12 directly to finance, that was so because the forms had an effect on Brocade's financials.
13 Falsifying options grants would therefore impair the integrity of the company's financials,
14 which a reasonable official would know is illegal under SEC rule and regulation.

15 In short, the Court does not believe that Jensen was so far removed from the financial
16 side of the process that she would not know her conduct was prohibited by the SEC. Jensen
17 clearly knew her conduct was unlawful and, the Court believes, knew that her conduct
18 affected Brocade's finances and audits. Under the circumstances, Jensen has not
19 persuasively established that she was unaware her conduct violated any SEC rule or
20 regulation.

21 SENTENCING GUIDELINES

22 In determining the sentence of co-defendant Gregory Reyes, the Court concluded that
23 it would be inappropriate to enhance the sentence for loss, number of victims, and
24 sophisticated means. See U.S.S.G. § 2B1.1(b); id. § 2B1.1(b)(2); id. § 2B1.1(b)(9). For the
25 reasons set forth in the Court's order of November 27, 2007 (Docket No. 737), the Court
26 reaches the same conclusion with respect to Jensen's sentence. As to other enhancements,
27 the Court will impose a two-level abuse of trust enhancement and a two-level enhancement
28

1 for obstruction of justice, but rejects the government’s request for an aggravating role
2 enhancement and a public officer enhancement.

3 A. Standard of Review

4 In general, the government bears the burden of proving, by a preponderance of the
5 evidence, the facts necessary to enhance a defendant’s offense level under the Sentencing
6 Guidelines. See United States v. Burnett, 16 F.3d 358, 361 (9th Cir. 1994). However, when
7 a sentencing factor has an extremely disproportionate effect on the sentence relative to the
8 offense of conviction, due process requires that the government prove the facts underlying
9 the enhancement by clear and convincing evidence. See United States v. Jordan, 256 F.3d
10 922, 926 (9th Cir. 2001).

11 Under Jordan’s “totality of the circumstances” test, the Court must determine the
12 appropriate standard of review by examining such factors as whether the government seeks
13 an increase of more than four offense levels, and whether the enhancements sought would
14 double the sentence. See id. at 928. Here, the government seeks an increase of nine offense
15 levels. With an increase of nine levels, Jensen’s recommended sentence would more than
16 double, from 0-6 months to 18-24 months. In light of the substantial increase in Jensen’s
17 recommended sentence that would result from applying the enhancements sought by the
18 government, the contested enhancements require clear and convincing evidence.

19 B. Base Offense Level

20 The parties dispute the appropriate base offense level. The base offense level for most
21 fraud-related crimes was increased from six to seven in the Guidelines manual that became
22 effective on November 1, 2003.² Jensen argues that applying the 2007 manual to her conduct
23 would violate Apprendi v. New Jersey, 530 U.S. 466 (2002), because the jury made no
24 finding that the conduct underlying its verdict occurred after November 1, 2003. The
25 government argues that it would not violate the ex post facto clause to apply the 2007 manual
26

27
28 ² The offense level for the books and records charge is dictated by U.S.S.G. § 2B1.1. See
U.S.S.G. App. A. The offense level for the conspiracy charge is identical to the substantive
offense, pursuant to U.S.S.G. § 2X1.1(a).

1 because there is no evidence that Jensen withdrew from the conspiracy or stopped falsifying
2 books and records after November 1, 2003.

3 Jensen's argument that Apprendi precludes the Court from making a finding of fact
4 regarding the end date of the conspiracy is off the mark. In short, there is no Apprendi
5 problem because the Sixth Amendment's right to a jury trial attaches only when the facts at
6 issue have the effect of increasing the maximum punishment to which the defendant is
7 exposed. Apprendi, 530 U.S. at 489-94. The advisory Guidelines do not have this effect;
8 they require the district judge to make findings of fact, but none of these alters the judge's
9 final sentencing authority, they merely inform the judge's broad discretion. United States v.
10 Booker, 543 U.S. 220, 233 (2005). Nonetheless, the Court concludes that a base offense
11 level of six is appropriate because the government has not demonstrated by clear and
12 convincing evidence that Jensen was convicted for conduct that occurred after November 1,
13 2003.

14 In general, the Court must use the Guidelines Manual in effect on the date that the
15 defendant is sentenced. See U.S.S.G. § 1B1.11(a). An exception exists, however, where use
16 of the Guidelines Manual in effect on the date the defendant is sentenced would violate the
17 Ex Post Facto Clause. See id. § 1B1.11(b)(1). In that event, the Court must use the manual
18 in effect on the date that the offense of conviction was committed. Id.; see also United States
19 v. Warren, 980 F.2d 1300, 1304 (9th Cir. 1992).

20 If the defendant is convicted of a continuing offense, and the offense continued after
21 amendments inflicting greater punishment have been made, the amended guidelines may be
22 applied without offending the Ex Post Facto Clause. See United States v. Beardslee, 197
23 F.3d 378, 387 (9th Cir. 1999). "If, however, the underlying offense is a non-continuing
24 offense that occurred before the amendment, or a continuing offense that was completed
25 entirely before the amendment, the defendant must be sentenced under the relevant
26 provisions of the guidelines in effect at the time the offense occurred." Id.

27 Jensen was convicted of conspiracy, which is a continuing offense. See United States
28 v. Castro, 972 F.2d 1107, 1112 (9th Cir. 1992). Thus, it would not violate Jensen's ex post

1 factio rights to impose a base offense level of seven unless she affirmatively abandoned the
2 conspiracy before November 1, 2003. See id. (holding that conspiracy is presumed to
3 continue until there is affirmative evidence of abandonment, withdrawal, disavowal, or
4 defeat of the object of the conspiracy). Jensen argues that she is entitled to a base offense
5 level of six because the jury did not find that the conspiracy continued past November 1,
6 2003. But that argument fails because even after Apprendi, the Court may make factual
7 findings in the course of selecting a sentence. See United States v. Ameline, 409 F.3d 1073,
8 1077 -78 (9th Cir. 2005) (en banc) (“Standing alone, judicial consideration of facts and
9 circumstances beyond those found by a jury or admitted by the defendant does not violate the
10 Sixth Amendment right to jury trial. A constitutional infirmity arises only when extra-verdict
11 findings are made in a mandatory guidelines system.”).

12 Jensen argues that it would violate Apprendi for the Court, as opposed to the jury, to
13 make a factual finding about the end-date of the conspiracy. In Apprendi, the Supreme Court
14 held that judicial factfinding violates the Sixth Amendment when that factfinding enhances
15 the maximum sentence to which a defendant is subject. See Apprendi, 530 U.S. at 490
16 (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime
17 beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a
18 reasonable doubt.”); see also Blakely v. Washington, 542 U.S. 296, 303 (2004) (“[T]he
19 ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose
20 solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”).
21 In Booker, the Court recognized that under the logic of Apprendi, it was unconstitutional for
22 sentencing courts to impose a higher sentence than that authorized by the “base” Guidelines
23 range – which was otherwise binding on the district court – by making findings of fact that
24 had not been found by the jury. But the Supreme Court resolved this problem not by
25 requiring juries to find facts relevant to sentencing, but by making the Guidelines effectively
26 advisory. Compare Booker, 543 U.S. at 244 (opinion of Stevens, J.) (requiring that jury find
27 facts necessary to support a sentence exceeding the maximum authorized by the facts
28 established by verdict or guilty plea), with Booker, 543 U.S. at 246-47 (opinion of Breyer, J.)

1 (concluding that because the constitutional infirmity of the Guidelines was attributable to
2 their mandatory application under the Sentencing Reform Act, the Sixth Amendment
3 problem would fall away if the Guidelines were merely advisory). There can be no doubt
4 that in light of the logic of Booker, the right to a jury trial – as well as the right to proof
5 beyond a reasonable doubt – does not apply to facts relevant to enhancements under an
6 advisory Guidelines regime. See Ameline, 409 F.3d at 1077-78; see also United States v.
7 Clark, 452 F.3d 1082, 1085-86 (9th Cir. 2006).

8 The case upon which Jensen relies – United States v. Julian, 427 F.3d 471 (7th Cir.
9 2005) – is inapposite because that case involved judicial factfinding that subjected the
10 defendant to an increased maximum penalty under a statute, the Protection of Children from
11 Sexual Predators Act of 1998. Julian was directly controlled by Apprendi because the judge
12 made a finding – that the conspiracy continued beyond the date when Congress increased the
13 maximum penalty authorized by statute – that increased the penalty for defendant’s crime
14 “beyond the prescribed statutory maximum.”

15 But the advisory Guidelines do not require the judge to find facts that have the effect
16 of increasing the maximum punishment to which the defendant is exposed. None of the facts
17 found during the sentencing process alters the judge’s final sentencing authority. See
18 Booker, 543 U.S. at 233 (“[W]hen a trial judge exercises his discretion to select a specific
19 sentence within a defined range, the defendant has no right to a jury determination of the
20 facts that the judge deems relevant.”). “Once a jury has found a defendant guilty of each
21 element of an offense beyond a reasonable doubt, he has been constitutionally deprived of his
22 liberty and may be sentenced up to the maximum sentence authorized under the United States
23 Code without additional findings beyond a reasonable doubt.” United States v. Grier, 475
24 F.3d 556, 561 (3d Cir. 2007) (en banc). That is to say, because the jury convicted Jensen of
25 conspiracy and falsifying books and records, the Court may sentence Jensen up to 20 years
26 imprisonment, see 15 U.S.C. § 78ff, without submitting any additional facts to the jury.

27 Because neither Apprendi nor Booker preclude judicial factfinding in the context of
28 sentence enhancements, the Court must determine whether there is sufficient evidence to

1 conclude that application of the 2007 Guidelines manual is appropriate because Jensen was
2 convicted for conduct that post-dated November 1, 2003.

3 As Jensen notes, the evidence at trial related almost exclusively to the period prior to
4 November 1, 2003, and there was no evidence introduced that Jensen was involved in the
5 preparation of stock option paperwork after that date. In the Ninth Circuit, a conspiracy is
6 presumed to continue until there is affirmative evidence of abandonment, withdrawal,
7 disavowal or defeat of the object of the conspiracy. See United States v. Bloch, 696 F.2d
8 1213, 1215 (9th Cir. 1982). But Colleen Devine testified at trial that the May 22, 2003 grant
9 minutes memorialized the “last grant” with which she and Jensen were involved together.
10 See RT 280, 286:8-14. Moreover, evidence at the Reyes trial established that “mid-year
11 2003,” June Weaver took over the stock option granting role played by Jensen. See Reyes
12 RT 445:12-16.³ In light of this evidence, the government has not established by clear and
13 convincing evidence that the conspiracy existed beyond November of 2003.

14 Similarly, the government has failed to meet its burden in proving that Jensen falsified
15 books and records after November 1, 2003. Because the latest grant minutes introduced by
16 the government connected to Jensen were prepared in June of 2003, see Exhibit 923, there is
17 no clear and convincing evidence to support the conclusion that Jensen falsified books after
18 the summer of 2003.

19 Because the Court is not confident that Jensen was convicted for conduct that
20 occurred after November 1, 2003, it would violate the ex post facto clause to subject her to a
21 base offense level of seven. Accordingly, Jensen’s guideline sentence will be calculated with
22 a base offense level of six.

23 C. Aggravating Role

24 Section 3B1.1 of the Sentencing Guidelines provides for a two to four-level
25 enhancement for aggravating role. If the defendant was an “organizer or leader of criminal
26

27 ³ In arriving at an appropriate sentence, the Court is not limited to a review of the
28 evidence proffered at trial. See United States v. Tucker, 404 U.S. 443, 446 (1972) (“It is surely
true . . . that before [determining what sentence to impose], a judge may appropriately conduct
an inquiry broad in scope, largely unlimited either as to the kind of information he may consider,
or the source from which it may come.”).

1 activity that involved five or more participants or was otherwise extensive,” the Court may
2 increase by four levels. U.S.S.G. § 3B1.1(a). If the defendant was a “manager or supervisor
3 (but not an organizer or leader) and the criminal activity involved five or more participants or
4 was otherwise extensive,” the Court may increase by three levels. See id. § 3B1.1(b). If the
5 defendant was “an organizer, leader, manager, or supervisor in any criminal activity other
6 than that described in (a) or (b),” the Court may increase by two levels. See id. § 3B1.1(c).

7 The government requests a three-level enhancement because Jensen was a manager or
8 supervisor of the backdating scheme. But an adjustment under this section would be
9 inappropriate because Jensen did not manage or supervise “one or more other participants.”
10 Id. § 3B1.1 App. n.2 (emphasis added). A “participant” is “a person who is criminally
11 responsible for the commission of the offense.” Id. § 3B1.1 App. n.1. Thus, to qualify for an
12 enhancement under § 3B1.1, “there must be evidence that the defendant ‘exercised some
13 control over others involved in commission of the offense [or was] responsible for organizing
14 others for the purpose of carrying out the crime.’” United States v. Harper, 33 F.3d 1143,
15 1151 (9th Cir. 1994) (quoting United States v. Mares-Molina, 913 F.2d 770, 773 (9th Cir.
16 1990)) (emphasis added). The government must show that Jensen exercised control over at
17 least one other participant, regardless of whether the offense was “otherwise extensive”
18 because the scheme involved unwitting outsiders. See United States v. Luca, 183 F.3d 1018,
19 1024 (9th Cir. 1999).

20 But the evidence at trial showed no such thing. While an enhancement for Reyes was
21 appropriate because he organized Jensen’s involvement, there is no evidence that Jensen
22 managed any other criminally responsible person (that is, a person who not only backdated
23 option grants but did so with the requisite mens rea). Indeed, the thrust of the government’s
24 theory at trial was that there were no criminally responsible parties other than Jensen and
25 Reyes. Perhaps for that reason, the government does not even attempt to identify a
26 criminally responsible party that was managed by Jensen. It follows that the government has
27 not borne its burden of demonstrating by “clear and convincing” evidence that an
28 enhancement under § 3B1.1 is appropriate.

1 D. Officer of a Public Company

2 Section 2B1.1(b)(15)(A)(i) authorizes a four-level enhancement if the offense
3 involved a violation of securities law and, at the time of the offense, the defendant was an
4 officer of a publicly traded company. Under the plain language of that enhancement, the
5 government must show that (1) the defendant violated a securities law and (2) the defendant
6 was a qualifying individual at the time of the violation.⁴ The government argues that Jensen
7 was convicted of a securities violation and, because Jensen was a “vice president” at
8 Brocade, she was, by definition, an “officer” of the company.

9 As to the first requirement, there can be no doubt that Jensen violated a “securities
10 law.” Section 2B1.1 defines “securities law” as “18 U.S.C. §§ 1348, 1350, and the
11 provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15
12 U.S.C. 78c(a)(47)); and . . . includes the rules, regulations, and orders issued by the
13 Securities and Exchange Commission pursuant to the provisions of law referred to in such
14 section.” U.S.S.G. § 2B1.1, cmt. n.14(A) (emphasis added). In turn, § 78c(a)(47) refers to
15 the provisions of the Securities Exchange Act, 15 U.S.C. § 78a et seq., one of which Jensen
16 was convicted of violating. Thus, the only material dispute is whether, at the time of the
17 offense, Jensen was an “officer.”

18 Section 2B1.1 does not include a definition of “officer.” Therefore, the Court must
19 look to other sources for the term’s meaning. The public officer enhancement was inserted
20 by the Sentencing Commission in response to Sarbanes-Oxley, and to Congress’ instruction
21 to “provide an enhancement for officers or directors of publicly traded corporations who
22
23
24

25
26 ⁴ In inserting the public officer enhancement into the Guidelines, the Commission
27 expressed concern over its discovery that the abuse of trust enhancement, U.S.S.G. § 3B1.3, was
28 applied to less than one-third of 35 officers or directors convicted of securities fraud offenses
in fiscal year 2001. See United States Sentencing Commission, The Sentencing Commission’s
Implementation of the Sarbanes-Oxley Act 13 (2003). The essence of the corporate officer
enhancement is that it assumes the public trust enhancement applies in cases involving corporate
officer defendants. See *id.*

1 commit fraud and related offenses.”⁵ Hence, it is only logical to look to Sarbanes-Oxley and
2 its accompanying regulations to discern the meaning of “officer.”

3 Unfortunately, “officer” is neither defined within Sarbanes-Oxley, nor by 15 U.S.C. §
4 78c, the provision of the Securities Exchange Act entitled “Definitions and Application.”
5 However, regulations promulgated by the SEC pursuant to § 78c do offer a definition of
6 officer. Rule 3b-2, 17 C.F.R. § 240.3b-2, defines officer to mean “a president, vice
7 president, secretary, treasury or principal financial officer, comptroller or principal
8 accounting officer, and any person routinely performing corresponding functions with
9 respect to any organization whether incorporated or unincorporated.” (Emphasis added).

10 In rules promulgated pursuant to Sarbanes-Oxley, the SEC has assumed that the
11 meaning of “officer” is controlled by the definition set forth in Rule 3b-2. See In re
12 Improper Influence on Conduct of Audits, Exchange Act Release No. 47,890 (May 20,
13 2003). Therefore, there are persuasive reasons for assuming that the SEC’s definition also
14 controls in the context of § 2B1.1.

15 However, even if Rule 3b-2 provides the applicable definition, the fact that Jensen
16 was a Vice President of Brocade is not dispositive. Courts must take a practical approach to
17 the determination of whether the defendant is an “officer”; the title of “Vice President” does
18 no more than create “an inference” that can be overcome by proof that the defendant did not
19 exercise the executive responsibilities traditionally associated with corporate officers. See
20 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Livingston, 566 F.2d 1119, 1122 (9th Cir.
21 1978); see also In re Gap Stores Sec. Litig., 457 F. Supp. 1135, 1141 (N.D. Cal. 1978)
22 (“Officers are correctly held to a higher standard of conduct than lesser employees . . . but

23
24 ⁵ The public officer enhancement only became effective in January of 2003. Because
25 the government charged Jensen with conduct that both pre- and post-dates the officer
26 enhancement, Jensen renews her argument that Apprendi precludes the Court from finding that
27 Jensen committed unlawful conduct after the triggering date. For the reasons provided above,
28 Jensen’s Apprendi argument is unpersuasive. Moreover, there is clear and convincing evidence
of unlawful activity post-dating the effective date of the officer enhancement. The government
proffered evidence of backdated grant minutes prepared by Jensen in June of 2003. See Trial
Exhibit 923. Witness Colleen Devine testified that Jensen was involved in grant minutes
memorializing a May 22, 2003 compensation committee meeting. See RT 286:8-14. This
evidence compels the conclusion that applying the public officer enhancement to Jensen’s
conduct would not violate her ex post facto rights.

1 even then courts are directed to look behind the title to determine whether some significant
2 access to inside information actually accompanied the position. Unlike directors, officers do
3 not necessarily possess any particular authority or responsibility.”). In the context of
4 Sarbanes-Oxley and § 2B1.1, the relevant question is whether the public officer enhancement
5 is appropriate because Jensen was the kind of Vice President who owed “heightened
6 fiduciary duties” to shareholders under the securities laws. See U.S.S.G. § 2B1.1,
7 Commentary (2003).

8 The government has not demonstrated – at least not by clear and convincing evidence
9 – that Jensen was the kind of Vice President who owed a heightened fiduciary duty to
10 shareholders. Brocade proxy statements, 10-Qs, and 10-Ks frequently listed corporate
11 officers, including the Vice Presidents in charge of Engineering, Operations, and Sales – core
12 decisional and policy-making roles – but never Jensen. See, e.g., Ragland Decl. Exh. B. In
13 addition, the government has identified no securities law that imposes heightened duties on
14 executives in divisions such as human resources, as opposed to divisions more closely
15 connected to the operational functions of the company.

16 To be sure, Jensen played an important internal role in the organization. Jensen was
17 one of only nine executives who reported directly to Reyes, see RT 650:12-15, in contrast to
18 sixteen Vice Presidents who did not, see RT 651:6-9. But the government has not pointed to
19 persuasive evidence demonstrating that Jensen played the kind of role in relation to
20 shareholders such that as head of Human Resources, she owed them a heightened fiduciary
21 duty. Accordingly, the Court will not impose the four-level public officer enhancement.

22 E. Abuse of Trust

23 Because the Court will not impose the public officer enhancement, it may consider
24 whether to impose an enhancement for abuse of trust. See U.S.S.G. § 2B1.1 cmt. n.14(C)
25 (providing that the Court may not apply § 3B1.3 if it enhances pursuant to subsection
26 (b)(15)). The abuse of trust enhancement allows for a two-level increase “[i]f the defendant
27 abused a position of public or private trust . . . in a manner that significantly facilitated the
28 commission or concealment of the offense.” U.S.S.G. § 3B1.3. An enhancement for abuse

1 of trust is appropriate because even if Jensen did not owe shareholders a heightened fiduciary
2 duty, she did exercise a position of trust because she enjoyed discretion over the maintenance
3 of books and records that affected Brocade financials.

4 To impose an enhancement for abuse of trust, the government must establish by clear
5 and convincing evidence that: (1) Jensen occupied a position of trust; and (2) Jensen abused
6 her position in a manner that significantly facilitated the commission or concealment of the
7 offense. As to the first inquiry, “the primary trait that distinguishes a person in a position of
8 trust from one who is not is the extent to which the position provides the freedom to commit
9 a difficult-to-detect wrong.” United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990). The
10 pertinent question is whether the defendant stands in a position of trust with respect to the
11 victim, in this case Brocade’s shareholders. See id. at 506. The Ninth Circuit has identified
12 two indicia of a position of trust.

13 The first indicium is the inability of the trustor objectively and expediently to
14 determine the trustee’s honesty. See id. This indicium turns on whether there is an objective
15 and expedient mechanism for discovering criminal activity in place, such as the daily audit of
16 an ordinary bank teller’s till. See id. There is a mechanism for discovering corporate fraud –
17 financial reporting requirements – but the mechanism can be easily evaded by corporate
18 officers, as this case demonstrates. Accordingly, the first indicium weighs in favor of
19 applying the abuse of trust enhancement.

20 The second indicium is the ease with which the trustee’s activities can be observed.
21 See id. This factor also favors imposition of the enhancement because there was substantial
22 distance between Jensen’s conduct and the watchful eyes of concerned shareholders.
23 Shareholders received only snapshots of financial data, and could not involve themselves in
24 the actual process of stock option granting. Accordingly, it was extremely difficult for
25 shareholders to oversee Jensen’s behavior.

26 Having occupied a position of trust, it must next be determined whether Jensen abused
27 her position “in a manner that significantly facilitated the commission or concealment of the
28 offense.” U.S.S.G. § 3B1.3. This inquiry turns on whether the position of trust “contributed

1 in some significant way to facilitating the commission or concealment of the offense (e.g., by
2 making the detection of the offense or the defendant’s responsibility for the offense more
3 difficult).” Id. cmt. n.1.

4 Jensen used her managerial position to escort the backdated stock option grants
5 through the necessary processes. It was Jensen who involved and oversaw employees in the
6 human resources department tasked with the picking of lower dates, Jensen who ordered her
7 employees to conceal the picking of past dates by not using email or phones, and Jensen who
8 coordinated the signing of falsified dates by Reyes, providing the CEO with an array of
9 earlier dates from which he could select. “A lesser employee of the firm could not have
10 accomplished these things . . . which significantly facilitated the scheme’s success and
11 concealment.” United States v. Bhagavan, 911 F. Supp. 351, 355 (N.D. Ind. 1995).

12 Even if Jensen did not owe a heightened fiduciary duty to shareholders, she was
13 entrusted with accurately maintaining books and records that affected the financials of the
14 company. Thus, there can be no doubt that shareholders were obligated to trust that Jensen
15 would properly maintain any books and records bearing on Brocade’s assets. Because
16 Jensen occupied a position of trust and abused that position to commit and conceal the
17 falsification of books and records, a two-level enhancement is appropriate.

18 F. Obstruction of Justice

19 The Court will enhance Jensen’s sentence by two levels pursuant to § 3C1.1 because
20 she impeded justice by proffering – through counsel – a false declaration in support of her
21 motion to sever. Jensen’s arguments that the declaration was truthful and that she should not
22 be punished for the conduct of her attorney are unpersuasive.

23 Section 3C1.1 of the Sentencing Guidelines provides for a two-level increase if “the
24 defendant willfully obstructed or impeded . . . the administration of justice with respect to the
25 investigation, prosecution, or sentencing of the instant offense of conviction, and . . . the
26 obstructive conduct related to . . . the defendant’s offense of conviction and any relevant
27 conduct; or . . . a closely related offense.” According to the application notes, a party
28

1 obstructs justice by “providing materially false information to a judge.” U.S.S.G. § 3C1.1,
2 cmt. n.4(f).

3 By providing non-exhaustive illustrations, the Sentencing Commission has left
4 considerable discretion in applying § 3C1.1 to the sentencing court. In view of the variety of
5 situations that might constitute obstruction of justice, the Commission necessarily relied on
6 the district court’s reasoned exercise of discretion in applying § 3C1.1 to particular fact
7 patterns. See United States v. Maccado, 225 F.3d 766, 770 (D.C. Cir. 2000).

8 Application of § 3C1.1 in this case requires the Court to answer two questions. First,
9 did Reyes’ declaration obstruct justice by impeding the prosecution of the instant offense of
10 conviction? Second, may Jensen be held responsible for the obstruction because her conduct
11 was willful and she bears responsibility for the acts of her counsel. As to the first question,
12 there can be no doubt that Reyes’ declaration did impede justice.

13 In his declaration, Reyes declared, “I told Ms. Jensen that the option grant dates were
14 the dates that I made the granting decisions. Options were priced at the fair market value on
15 the grant dates.” Reyes Decl. ¶7 (emphasis added). Jensen argues that no one obstructed
16 justice because the declaration did not provide false information to the Court. According to
17 Jensen, Reyes’ declaration intended to convey that he sometimes priced grant dates on the
18 same day he made granting decisions, but was not intended to deny that on other occasions,
19 Reyes did backdate option grants with Jensen’s help. See Defendant’s Sentencing Brief Exh.
20 1 at 2.

21 Even if Jensen is correct that, technically speaking, Reyes’ statement was not per se
22 false, the Court still finds that the declaration impeded justice because it was seriously
23 misleading. Within the context of Jensen’s motion to sever, the Court was attempting to
24 figure out whether a severance was appropriate because Reyes could offer exculpatory
25 evidence on Jensen’s behalf. A key factor in the Court’s determination was “the possible
26 weight and credibility of the predicted testimony.” United States v. Kaplan, 554 F.2d 958,
27 966 (9th Cir. 1977) (per curiam). Jensen’s counsel argued that paragraph seven of Reyes’
28 declaration was “as exculpatory as it gets,” because the jury could not convict Jensen if

1 Reyes' statement was true. See Order Granting Motion to Unseal, Exh. C at 3. Jensen's
2 counsel also stated that there was "no evidence" Jensen knew about Reyes' backdating, and
3 argued that the language in the declaration was "specific," "unambiguous," and "couldn't be
4 clearer." Id. at 4, 5.

5 Reyes' declaration, in combination with the statements of counsel, misled the Court
6 into believing that Reyes' declaration related to all stock option grants. Whether or not
7 Reyes and Jensen's counsel subjectively believed that the declaration only related to some
8 grants, there was no way for the Court to discern that subtle distinction. It was impossible
9 for the Court to understand the true meaning of the declaration because the Court was told
10 that the language was "unambiguous" and "couldn't be clearer." But the declaration was
11 only unambiguous if it means what it says, that is, that Reyes dated options on the date he
12 made options decisions. The declaration nowhere suggests that it is limited to certain grants,
13 and to so argue obliterates the notion that the declaration was clear or unambiguous.

14 Moreover, it is impossible to reconcile the argument – made at the time of severance
15 by Jensen's counsel – that the Reyes declaration precluded conviction with Jensen's current
16 argument that Reyes' declaration only related to some option grants. If the declaration
17 related to some option grants, then the jury surely could convict – as they did – based on
18 other backdated grants.

19 Thus, even if Reyes' statements were per se true, an enhancement for impeding justice
20 is appropriate because proffering misleading evidence in an attempt to persuade the Court to
21 grant an otherwise-unjustified severance motion is the kind of conduct that falls under the
22 ambit of § 3C1.1.⁶ See United States v. Magana-Guerrero, 80 F.3d 398, 401 (9th Cir. 1996)
23 ("As we see it, what distinguishes the application notes [dealing with false information] that
24 don't require actual obstruction from those that do is that the former anticipate lack of candor
25

26
27 ⁶ There can be no doubt that the severance motion was otherwise unjustified. If Jensen
28 had honestly represented that the declaration only related to some option grants, the severance
motion would have been denied out of hand. That is so because testimony from Reyes that he
told Jensen certain options were properly dated would matter not a whit in the face of the
prosecution's evidence that Jensen knew other options were being backdated.

1 toward the court.”) (emphasis added). Other courts have imposed an obstruction
2 enhancement in analogous situations.

3 For example, in United States v. Alexander, 292 F.3d 1226 (10th Cir. 2002), the
4 defendant filed a motion in limine to suppress statements made under interrogation. In
5 support of the motion, the defendant testified about his recollection of an event, but the
6 testimony contradicted testimony later provided at trial. The district court concluded that the
7 defendant perjured himself and imposed a two-level enhancement for obstruction of justice.
8 The Tenth Circuit, while upholding the enhancement, based its decision on an alternate
9 ground. The court concluded that the defendant had “impeded” the administration of justice
10 by delaying the trial and subsequent sentencing “by initiating a sham proceeding during
11 which [he] repeatedly uttered falsehoods under oath.” Id. at 1235. Defendant thereby
12 squandered the energies of the court and the judge for a meritless motion. Id. The court
13 acknowledged that “a defendant has an absolute right to mount a maximum defense to any
14 criminal charge, including making a pre-trial motion to suppress evidence,” but warned that
15 “[o]ne cannot utilize the resources of the judicial process to deliberately lie under oath and
16 contest the government’s position that lies at the heart of a motion. . . . One cannot do this,
17 in the language of ancient common law, without suffering ‘pains and penalties,’ which, in
18 this case, is an enhancement of the sentence.” Id. As the court concluded, “[m]aking a
19 motion in limine that is based on lies and falsehoods, and then demanding and participating
20 in an evidentiary hearing that reeks of prevarication, not only insults the judicial process, but
21 also ‘willfully . . . impede[s] . . . the administration of justice.’” Id. (quoting U.S.S.G. §
22 3C1.1) (emphasis added). Just so here, participating in a motion to sever by proffering a
23 declaration that was “based on lies and falsehoods,” which leads to a hearing that reinforces
24 and relies on those falsehoods, not only insults the judicial process but constitutes an
25 obstruction of justice.

26 However, this case presents unique considerations because Jensen did not herself sign
27 the declaration, she merely proffered it in support of her motion to sever. The question thus
28 arises whether Jensen may be held accountable when she did not personally make the false

1 statement. Jensen argues that there is no evidence she acted “willfully” – that is, with the
2 purpose of impeding justice, see United States v. Lofton, 905 F.2d 1315, 1316-17 (9th Cir.
3 1990) – and that she should not bear responsibility for the acts of others. On both counts the
4 Court disagrees.

5 As Jensen acknowledges, the Ninth Circuit has not resolved whether a defendant may
6 be punished for proffering a false declaration filed by a third party. But other circuits have
7 held that where, as here, the defendant sits idly by when materially false information – which
8 the defendant knows to be false – is provided to a judge, it is appropriate to enhance for
9 obstruction of justice. For example, in United States v. Owolabi, 69 F.3d 156 (7th Cir.
10 1995), a Nigerian citizen was charged with transporting counterfeit and forged securities.
11 During a hearing before a magistrate judge, the defendant’s attorney asserted that the
12 defendant was a legal resident. Id. at 160. The sentencing judge concluded that because the
13 defendant was not a legal resident, an enhancement for obstruction of justice was
14 appropriate. On appeal, the defendant argued that he was silent during the hearing and that
15 an enhancement would violate his Fifth Amendment rights. See id. at 162. The Seventh
16 Circuit disagreed, concluding that the defendant had provided materially false information to
17 the magistrate by acquiescing in and standing “idly by” as his attorney stated to the court on
18 behalf of the defendant that he was a resident alien. Id. at 164. The court held that because
19 “the defense attorney has been considered the defendant’s mouthpiece and therefore able to
20 speak on behalf of his client,” “[a] defendant cannot stand idly by while he hears his attorney
21 provide false information to the court. . . .” Id. (quotation omitted).

22 Other courts have similarly held § 3C1.1 apposite where the defendant permits her
23 lawyer to proffer misleading or false information on her behalf. Thus, a defendant cannot sit
24 idly by while her lawyer calls a witness whom the defendant knows will testify falsely, see
25 United States v. Washington, 171 Fed. Appx. 986, 988 (4th Cir. 2006), while the lawyer
26 presents a fraudulent document to the court, United States v. Welch, 2003 WL 22232798, *5
27 (N.D. Ill. 2003), or while the lawyer orally provides false information to the judge, see
28 United States v. Stallings, 194 Fed. Appx. 827, 838 (11th Cir. 2006). All of these cases stand

1 for the proposition that “[b]ecause a lawyer acts as a defendant’s agent, misleading
2 presentations made through counsel (with the defendant’s acquiescence) can be a basis for
3 enhancing punishment even though the defendant was otherwise silent.” United States v.
4 Peterson, 37 Fed. Appx. 789, 791 (7th Cir. 2002).

5 Here, Jensen sat in court while her lawyer argued that Reyes’ declaration provided
6 “absolutely exculpatory” evidence that precluded the jury from convicting Jensen for
7 backdating options. Jensen also sat idly by while her lawyer argued that there was no
8 evidence Jensen actually knew that Reyes was backdating. See Order Granting Motion to
9 Unseal, Exh. C at 5. But at the time, Jensen did know that Reyes had backdated, and
10 therefore knew that Reyes’ declaration was not “absolutely exculpatory.” See Jensen FBI
11 Form 302 at 3 (Jensen acknowledging that she knew Reyes was backdating options) (March
12 18, 2005).⁷

13 Because Jensen knew that Reyes’ declaration was not accurate, the Court is also
14 unpersuaded by her assertion that any obstruction was not willful. There can be no doubt
15 that Jensen acted with the intent to mislead the Court because the Form 302 and the evidence
16 proffered at trial both demonstrate that Jensen knew – at the time the Reyes declaration was
17 proffered – that the declaration was not exculpatory. Jensen knew that Reyes backdated, but
18 she nonetheless sat idly by while her lawyer represented to the court that a severance was
19 justified because Reyes would testify otherwise. Put simply, that kind of conduct is not

20
21 ⁷ Jensen argues that her Form 302 is exculpatory because it demonstrates that she had
22 already admitted to authorities that she knew of Reyes’ backdating, the suggestion being that
23 Jensen would not take one position with the FBI and another before the Court. It is true that
24 because Jensen had already acknowledged that backdating occurred to the FBI, it would have
25 been terribly risky to argue to the Court that Jensen did not know Reyes was backdating,
26 provided that parties with access to the 302 had an opportunity to impugn the Reyes declaration.
27 Of course, at the time, the Court had no way of knowing what Jensen had told authorities and
28 the declaration was filed ex parte and sealed. Similarly, the government was excluded from the
hearing on Jensen’s motion. Thus, Jensen could offer the Reyes declaration, safe in the
assurance that the United States Attorney could not contemporaneously challenge the veracity
of Reyes’ declaration.

26 If anything, the Form 302 is seriously damaging to Jensen’s position. It conclusively
27 demonstrates that when counsel argued that the Reyes declaration was absolutely exculpatory
28 because it suggested that Jensen was unaware of Reyes’ backdating, Jensen knew the Court was
being misled. What is more, it demonstrates that Jensen’s counsel – who was present at the
FBI’s interview – also had reason to know that Reyes’ declaration was neither exculpatory nor
accurate, as drafted.

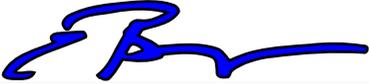
1 permitted by § 3C1.1 because when a defendant's lawyer proffers misleading evidence to the
2 court, which the defendant knows to be inaccurate, the failure to act can form the basis of an
3 enhancement for obstruction.

4 **CONCLUSION**

5 Because Jensen has not carried her burden of proving that the No Knowledge Clause
6 controls her sentence, the Court will impose a sentence with an eye towards – among other
7 factors – the Sentencing Guidelines. See 18 U.S.C. § 3553(a). With a base offense level of
8 six, plus two-level enhancements for abuse of trust and obstruction of justice, the Guidelines
9 recommend a sentence of 6-12 months. Because the sentence falls within Zone B, the
10 minimum term may be satisfied by a sentence of imprisonment that includes a term of
11 supervised release with a condition that substitutes community confinement or home
12 detention, provided that at least one month is satisfied by imprisonment. See U.S.S.G. §
13 5C1.1(c)(2).

14 **IT IS SO ORDERED.**

15
16
17 Dated: March 4, 2008



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE